No. 02-1226

In the Supreme Court of the United States

WILLIAM O. SCHISM AND ROBERT REINLIE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
E. ROY HAWKENS
Attorneys

Department of Justice
Washington, D.C. 20530-0001
(202) 514–2217

JOHN A. CASCIOTTI
Department of Defense
Office of the Deputy General Counsel
Personnel and Health Policy
Washington, D.C. 20231

QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that, because military pay and compensation are governed exclusively by statute and regulation, retirees may not rely on common-law principles to assert an implied-in-fact contract right to free, unconditional, lifetime medical care.

2. Whether the governing statutes between 1941 and 1956, or the inherent authority of the President as Commander in Chief, conferred "actual authority" on military officials to bind the government to alleged promises of free, unconditional, lifetime medical care.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 02-1226

WILLIAM O. SCHISM AND ROBERT REINLIE,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals sitting en banc (Pet. App. 1a-90a) is reported at 316 F.3d 1259. The panel opinion of the court of appeals (Pet. App. 93a-111a), withdrawn by the en banc court (Pet. App. 91a-92a), is reported at 239 F.3d 1280. The opinion of the district court (Pet. App. 112a-128a) is reported at 19 F. Supp. 2d 1287.

JURISDICTION

The judgment of the court of appeals sitting en banc was entered on November 18, 2002. The petition for a writ of certiorari was filed on January 24, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case concerns whether petitioners, two retired members of the armed services, have an enforceable implied-in-fact contract for free, unconditional, lifetime health care from the United States.

1. Before 1956, legislation addressing medical care for military retirees was "fragmentary." S. Rep. No. 1878, 84th Cong., 2d Sess. 2 (1956). The most relevant statute, 5 U.S.C. 301, merely provided that the "head of an Executive department or military department" was permitted to "prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. 301. Military regulations often permitted the services to provide medical care to retired service members. Those regulations, however, generally made such care contingent on certain conditions, such as the availability of space and personnel in military medical facilities.

For example, in 1934, Army Regulation (AR) 40-505 permitted the admission of Army retirees to Army hospitals provided "sufficient accommodations are available." Gov't C.A. Reg. Add. 1a.[1] AR 404-590—which addressed the administration of Army hospitals—echoed that rule. Army retirees, it provided, could be admitted to Army medical facilities that were "available," but it "limited" such admissions "to cases which in the judgment of the commanding officer of the hospital will be benefited by hospitalization for a reasonable time." *Id.* at 4a-5a. AR 40-506, which super-

[1] "Gov't C.A. Reg. Add." refers to the Regulatory Addendum that was filed in the Federal Circuit as an attachment to the government's brief on rehearing en banc.

seded AR 404-590 in 1950, was similar. Like its predecessor, AR 40-506 provided that medical care at Army hospitals would be furnished to retirees and their dependents "on a 'when adequate facilities are available' basis." *Id.* at 6a. AR 40-506 also continued the Army's practice of restricting retiree admissions to those "cases which, in the judgment of the commanding officer of the hospital, will be benefited by hospitalization for a reasonable time." *Id.* at 8a. And it excluded "personnel of the Armed Forces suffering from chronic diseases * * * or those requiring merely domiciliary care by reason of age or chronic invalidism." *Id.* at 6a; see *id.* at 9a-11a (1952 version of AR 40-506). AR 40-108, which superseded AR 40-506 in 1955, continued that tradition. "[D]ependents and retired personnel should not undertake travel to an Army medical treatment facility," it warned, "without first ascertaining whether and when accommodations will be available." *Id.* at 13a.

The Air Force, which was established in 1947, followed Army regulations until 1951. See National Security Act of 1947, Pub. L. No. 253, 61 Stat. 495. In 1951, the Air Force promulgated Air Force Regulation (AFR) 160-73 to provide "General Procedures for Administering Air Force Hospitals, Infirmaries, and Dispensaries." Gov't C.A. Reg. Add. 15a. AFR 160-73 specifically "limited" the care of retirees to those "cases which in the judgment of the hospital commander will be benefited by hospitalization for a reasonable length of time," and barred the admission of retirees requiring "domiciliary-type care because of age or chronic invalidism." *Id.* at 16a. Dependents of retirees had access to hospitalization and out-patient care only if "practicable and accommodations for their care are available." *Id.* at

17a. See *id.* at 18a-20a (reproducing AFR 160-73 (1953), which imposed similar limitations for retirees).

The Navy followed a similar pattern. The Act of January 19, 1929, ch. 85, 45 Stat. 1090 (codified at 24 U.S.C. 31 (Supp. IV 1930)), which remained in effect until 1956, provided that the Secretary of the Navy "may" provide for the care of Navy retirees in another government hospital, subject to the consent of that hospital, when sufficient space in Navy hospitals was "not available." Implementing that statute, the Navy Manual of the Medical Department (MEDMAN) stated in 1939 that "[r]etired officers and enlisted men * * * are *not* entitled to civilian medical and hospital treatment at Government expense. They are entitled to treatment in naval hospitals and by naval medical officers *when available*." Gov't C.A. Reg. Add. 26a (emphasis added); see *id.* at 30a (1942 MEDMAN § 3168) (same); *id.* at 33a (1943 MEDMAN § 3168) (same); *id.* at 44a (1945 MEDMAN § 4132) (Naval retiree "may be admitted to any naval hospital upon application."). In 1947, Section 4132 of the MEDMAN was revised to state that Naval retirees "shall, if in need of *hospital care*, be admitted." *Id.* at 46a (emphasis added). That provision by its terms "related only to hospital care * * * and covered only the period when it was in effect," *i.e.*, between 1947 and 1956. *Sebastain* v. *United States*, 185 F.3d 1368, 1372 (Fed. Cir. 1999), cert. denied, 529 U.S. 1065 (2000).

2. In 1956, Congress established for the first time a uniform system of health care for military service members, dependents, and retirees, through the Dependents' Medical Care Act (DMCA), Pub. L. No. 84-569, 70 Stat. 250 (codified at 10 U.S.C. 1071 *et seq.*). Military retirees, the Act provided, "may, upon request, be given medical and dental care in any facility of any

uniformed service, *subject to the availability of space and facilities and the capabilities of the medical and dental staff*." 10 U.S.C. 1074(b) (emphasis added). See also 10 U.S.C. 1076(b) (medical and dental care for dependents of retirees subject to same restrictions). To address the fact that, in many instances, space was unavailable for the care of dependents of *active* duty members, Congress directed the Secretary of Defense to "contract for" their medical care under insurance or health plans. DMCA, § 201, 70 Stat. 252; see H.R. Rep. No. 1805, 84th Cong., 2d Sess. 4 (1956). That eventually resulted in a program known as the Civilian Health and Medical Program of the Uniformed Services, or "CHAMPUS."

Congress concluded that "its first obligation is to provide an improved medical-care program for the wives and children of all active duty personnel." H.R. Rep. No. 1805, *supra*, at 9. Accordingly, Congress declined to include retirees or their dependents in the new civilian sector (CHAMPUS) program "until at least a cost and experience level has been obtained." H.R. Conf. Rep. No. 2195, 84th Cong., 2d Sess. 9 (1956). Military retirees and their dependents, however, continued to be eligible for care from military personnel in military medical facilities on a space-available basis pursuant to 10 U.S.C. 1074(b), 1076. See H.R. Rep. No. 1805, *supra*, at 5, 8.

In 1966, Congress again responded to the fact that the demand for military medical care often exceeded capacity. See S. Rep. No. 1434, 89th Cong., 2d Sess. 1 (1966). The new legislation specifically addressed retiree medical care by expanding CHAMPUS, authorizing military departments to contract for the provision of civilian health care to retired service members not eligible for benefits under Medicare (*i.e.*, those who

have not reached age 65) and their dependents. 10 U.S.C. 1086(d)(1).[2] Upon reaching age 65, military retirees were entitled to benefits under the then-newly established Medicare program.[3] Medical treatment at military facilities, moreover, continued to be provided to all military retirees and their dependents on a space-available basis. See 10 U.S.C. 1074(b), 1076.

In 1986, Congress enacted 10 U.S.C. 1097 and 1099 to improve the quality of health care for all service members, including retirees. Section 1097 authorizes the Secretary of Defense to contract with health maintenance organizations, 10 U.S.C. 1097(a)(1), preferred provider organizations, 10 U.S.C. 1097(a)(2), individual providers, medical facilities, or insurers, 10 U.S.C. 1097(a)(3), and consortiums of such entities, 10 U.S.C. 1097(a)(4), for the provision of medical services to active and retired service members. The resulting pro-

---

[2] For out-patient services under CHAMPUS, a military retiree is responsible for payment of a fiscal year deductible of $150 for a single individual, or $300 for a family, together with 25% of all subsequent allowed charges. 10 U.S.C. 1086(b)(1)-(2). For hospitalization, the retiree is responsible for payment of 25% of all allowed charges for inpatient care. 10 U.S.C. 1086(b)(3). A retiree or his family cannot be required to pay more than $7500 for health care costs under CHAMPUS during any fiscal year. 10 U.S.C. 1086(b)(4).

[3] Medicare benefits consist of two parts. Part A provides basic hospital insurance protection, which protects against the costs of hospital care, related post-hospital care, home health services, and hospice care; retirees are automatically entitled to those benefits. 42 U.S.C. 1395c. Part B provides certain physician's services, home health services, laboratory services, and other services not covered under Part A. 42 U.S.C. 1395k. To obtain benefits under Part B, retirees must enroll, 42 U.S.C. 1395j, and monthly premiums are collected through a deduction from the retiree's social security benefits, 42 U.S.C. 1395s.

gram, known as TRICARE, offered CHAMPUS-eligible beneficiaries a choice of three programs: (1) TRICARE Prime, an HMO-type program with a primary care manager, which, for retirees and their family members, requires an annual premium and predetermined co-payments for services, 32 C.F.R. 199.17(d) and (m), 199.18(f); (2) TRICARE Extra, a preferred provider network plan, which does not require an annual premium, and which reduces normal co-payments, 32 C.F.R. 199.17(m); and (3) TRICARE Standard, under which enrollees receive the same benefits as under CHAMPUS, 32 C.F.R. 199.17(f); see pp. 5-6 & note 2, *supra*. In all three programs, the total annual out-of-pocket costs for retiree families is capped at $3000. 32 C.F.R. 199.18(f).

To stimulate enrollment in TRICARE Prime, Congress amended 10 U.S.C. 1097 in 1996 to require that TRICARE Prime enrollees be given "reasonable preferences" when seeking medical care in military facilities. See 10 U.S.C. 1097(c). Because TRICARE enrollment was limited to CHAMPUS-eligible beneficiaries (and thus excluded retirees over age 65, who are eligible for Medicare), the priority tended to reduce the space in military medical facilities available for the care of Medicare-eligible retirees and their dependents. In 1997 and 1998, Congress enacted a series of programs to ameliorate that effect and expand coverage for military retirees.[4]

---

[4] In 1997, Congress enacted the "Medicare subvention demonstration project for military retirees." That program provided Medicare funding for a Department of Defense program similar to TRICARE Prime. 42 U.S.C. 1395ggg. In 1998, Congress adopted a series of demonstration projects for Medicare-eligible DoD beneficiaries as Sections 721 to 723 of the National Defense Authorization Act for Fiscal Year 1999, Pub. L. No. 105-261, 112 Stat.

In 2000, Congress took more dramatic action by enacting the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 712, 114 Stat. 1654A-176 to 1654A-179. That Act established a new "TRICARE For Life" program for Medicare-eligible military retirees (military retirees over 65). TRICARE For Life provides, among other things, a pharmacy services program and expanded medical coverage. Under the "TRICARE Senior Pharmacy Program," Medicare-eligible beneficiaries not only continue to be eligible for prescription drugs from military facilities on an as-available basis, but also can elect to obtain prescriptions from civilian retail pharmacies or mail-order pharmacy services, primarily at DoD expense.[5] In addition, the new program makes Medicare-eligible military retirees enrolled in Medicare Part B eligible for CHAMPUS, 10 U.S.C. 1086(d)(3), and thus provides complete coverage. For all medical services that would normally be covered by Medicare, the total bill will be paid by the federal government; Medicare pays first, and CHAMPUS pays the rest. 32 C.F.R. 199.8(d)(1)(iii)(A); 66 Fed. Reg. 40,601-40,609 (2001). For services not covered by Medicare, CHAMPUS will pay subject to an annual deductible of

---

2061-2069, including (1) the Federal Employees Health Benefits Program Demonstration Project (§ 721, 112 Stat. 2061-2065); (2) TRICARE as a Supplement to Medicare (§ 722, 112 Stat. 2065-2068); and (3) the Pharmacy Redesign Implementation (§ 723, 112 Stat. 2068-2069).

[5] Beneficiaries pay $3 per prescription for generic drugs from designated network retail pharmacies or the National Mail Order Pharmacy Program, with no deductible. 32 C.F.R. 199.21(f)(2). Alternatively, they pay up to 20% per prescription, after a deductible, for non-generic drugs from non-network retail pharmacies. 32 C.F.R. 199.21(f)(4); see 66 Fed. Reg. 9657 (2001).

$150 per person or $300 per family, plus 25% of all other allowable charges up to the total annual cost-sharing limit of $3000. 10 U.S.C. 1086(b); 32 C.F.R. 199.8(d)(1)(iii)(B).

DoD described the impact of the new TRICARE For Life program in the preamble to its implementing regulations:

> This regulation and the statute it implements represent the most significant expansion of benefits in the Military Health System since 1956, when Congress created CHAMPUS to supplement space available care in military treatment facilities. As an indication of this, in FY-2000, DoD spent an estimated $1.4 billion providing space available health care in military facilities to beneficiaries over age 65; in FY-2002, in addition to this anticipated level of military facility services, DoD will spend another approximately $3.9 billion as second payer to Medicare for civilian sector inpatient and outpatient services and primary payer for civilian pharmacy outpatient drugs. These new benefits for retirees and their eligible family members over age 65 result in a remarkably comprehensive health care benefit with minimal beneficiary out-of-pocket costs.

66 Fed. Reg. 40,602 (2001).

3. Petitioners William O. Schism and Robert Reinlie retired from the armed services in 1979 and 1967, respectively. Schism served as an enlisted Naval service member from 1943 until 1946, and he served intermittently in the Navy and Army between 1947 and 1951. In 1951, he received an indefinite appointment as an Air Force officer. His Air Force service alternated between active and inactive status until 1956, when he began a period of active service that continued until he

retired in 1979 as a lieutenant colonel. Pet. App. 122a. Petitioner Robert Reinlie served as an enlisted Army service member from 1942 until 1945. He entered the Air Force in 1951 and received an indefinite appointment as an Air Force officer in 1953. He served continuously until he retired in 1967 as a lieutenant colonel. See *ibid.*

In 1996, petitioners filed suit in the United States District Court for the Northern District of Florida, claiming that the government had breached an implied-in-fact contract by failing to provide free, lifetime medical care to them and their dependents. According to petitioners, military recruiters had promised that, upon retirement, they and their dependents would receive free, unconditional, lifetime medical care as part of their retirement benefits. Petitioners alleged that, in reliance on those promises, they had served for more than 20 years in the military and then retired. Petitioners asked the court to order the United States to reimburse them for the health care payments they made since retiring, to stop deducting Medicare payments from their Social Security benefits, to provide them with free medical care at military hospitals, and to provide an alternative mechanism of free medical care for retirees and dependents who have no access to military hospitals.

The district court granted summary judgment to the government. The court held that pre-1956 military regulations do "not establish such a right to free lifetime medical care. Instead, the regulations provide for

care upon a space available basis, or upon the determination of the medical officer in charge of the facility." Pet. App. 126a. The court observed:

> [M]any of the affidavits in the record were provided by former military recruiters, who stated that they thought that free lifetime health care was a benefit of military service. But under *Federal Crop. Ins. Corp.* v. *Merrill* [332 U.S. 380 (1947)], even where the government agent making a representation is unaware that the representation is inaccurate, the government is not bound by such representations.

Pet. App. 126a. The district court also rejected the claim that the government had, by providing free medical care to many retirees until the 1990s, created an entitlement to that care. The gratuitous provision of medical care on a space-available basis, the court held, is consistent with governing law and "is insufficient, without more, to form the basis for an implied contract." *Id.* at 127a.

4. A panel of the Federal Circuit reversed. The panel held that, to the extent that recruiters had promised petitioners that they and their dependents would receive free lifetime medical care, Pet. App. 101a-104a, the recruiters had actual authority to bind the government under 5 U.S.C. 301, Pet. App. 105a-107a. "There is nothing in the regulations or law prior to 1956 that would have prohibited recruiters from making these promises," the court stated; "indeed those regulations appear to authorize them." *Id.* at 105a. The panel reversed the order granting summary judgment for the government and entered summary judgment for petitioners. *Id.* at 111a.

The court of appeals granted rehearing en banc, withdrew the panel's opinion, Pet. App. 91a-92a, and af-

firmed the district court's judgment. The court observed that this Court's cases and Federal Circuit precedent have consistently held that military pay and benefits are controlled by statute and regulation, not contract. *Id.* at 11a-12a, 17a-24a. Because military health care benefits "have long been exclusively a creature of statute," the court explained, petitioners' "discussions with recruiters could not have formed binding contracts with the government." *Id.* at 26a. On that "basis alone," the court stated, it could "dispose of this appeal." *Ibid.*[6]

In the alternative, the court held that petitioners could not prevail even under standard contract principles. To establish a contract, the court explained, petitioners had to show that the military officials who allegedly promised free, lifetime medical care had actual authority to bind the government. In this case, the court of appeals held that such authority was lacking. Rejecting petitioners' reliance on 5 U.S.C. 301, the court of appeals held that Section 301 is "a housekeeping statute that authorizes rules of agency organization, procedure, or practice." Pet. App. 34a. Section 301 does not itself authorize government officials to establish "substantive" rules that "affect[] individual rights and obligations," such as an enforceable entitlement "to

---

[6] Contrary to petitioners' assertion (Pet. 5), the court did not "recognize[]" that recruiters "had actually * * * made" promises of free, lifetime medical care "at the behest of superiors." Rather, the court assumed, for purposes of the summary judgment motion, the correctness of petitioners' factual assertions. See Pet. App. 43a (court observes that "the government conceded for the purposes of the present summary judgment motion that the asserted promises were made by plaintiffs' recruiters, made in good faith, and relied upon"); *id.* at 11a (same).

free, lifetime medical care." *Ibid.* (quoting *Chrysler Corp.* v. *Brown*, 441 U.S. 281, 302 (1979)).

The court of appeals rejected petitioners' contention that the President, as Commander in Chief, has inherent power to authorize recruiters to promise free, lifetime medical care. The court noted that such a power would violate the Anti-Deficiency Act, 31 U.S.C. 1341(a)(1)(B), which bars a federal official from involving the Government "in a contract or obligation for the payment of money before an appropriation is made unless authorized by law." Pet. App. 47a-48a. And the court of appeals held that according the President such a power would be inconsistent with separation of powers principles, since it would encroach on Congress's exclusive prerogative to appropriate funds under the Appropriations Clause of the Constitution. See *id.* at 48a.

Finally, and again in the alternative, the court of appeals held that petitioners' implied-in-fact contract claim was foreclosed by the terms of their express contracts. Petitioners, the court explained, had agreed in written contracts to be bound by military regulations. Pet. App. 30a. Those regulations made it clear that free medical care for retirees was a conditional privilege, not an unqualified right. *Id.* at 44a. Thus, even if military officials had made promises of free lifetime medical benefits when recruiting petitioners, those "promises would be a nullity because * * * the pertinent regulation"—which petitioners had accepted as binding—"provided to the contrary." *Id.* at 43a-44a.[7]

---

[7] Petitioners received indefinite appointments to the Air Force in 1951 and 1953 respectively, and both retired from the Air Force. See pp. 9-10, *supra*. Accordingly, the court of appeals held (and petitioners did not dispute) that the Air Force regulations address-

Four judges dissented, essentially for the reasons expressed in the original panel decision. Pet. App. 70a-90a.

ARGUMENT

The court of appeals' en banc decision is correct and does not conflict with any decision of this Court or any court of appeals. Indeed, the decision is substantially identical to *Sebastain* v. *United States*, 185 F.3d 1368 (Fed. Cir. 1999), in which this Court denied certiorari three years ago, 529 U.S. 1065 (2000).[8] Nothing has changed since then to suggest a different result. To the contrary, since *Sebastain*, Congress has enacted legislation—including the TRICARE For Life program, pp. 8-9, *supra*—to enhance health care for military retirees such as petitioners. The court of appeals' decision in this case, moreover, rests on three alternative grounds, one of which is not challenged in the petition.

1. Petitioners first contend (Pet. 8) that the Federal Circuit erred in holding that, because a service member's entitlement to compensation derives exclusively from statute and regulation, petitioners cannot assert a common-law, implied-in-fact contract claim for free, unconditional, lifetime medical care. This Court, how-

---

ing medical care for retirees were the only regulations pertinent to this case. Pet. App. 42a. The court of appeals concluded, however, that the regulations of the other military branches were consistent with its holding, because they too "provide[d] only for contingent care, principally based on availability." *Id.* at 45a.

[8] In *Sebastain*, the court of appeals held that (1) military recruiters lacked statutory authority to promise service members an unqualified right to free, lifetime medical care upon retirement, 185 F.3d at 1371; (2) military regulations established that retirees do not have an unqualified right to free, lifetime medical care, *id.* at 1371-1372; and (3) only Congress is empowered to provide military retirees with the benefits they seek, *id.* at 1372-1373.

ever, has repeatedly recognized that "common-law rules governing private contracts have no place in the area of military pay. A soldier's entitlement to pay is dependent upon statutory right." *Bell* v. *United States*, 366 U.S. 393, 401 (1961). As a result, a service member's putative right to benefits that are in the nature of compensation "must be determined by reference to the statutes and regulations governing the [benefits], rather than to ordinary contract principles." *United States* v. *Larionoff*, 431 U.S. 864, 869 (1977); see *Zucker* v. *United States*, 758 F.2d 637, 640 (Fed. Cir.) (Military benefits are governed by "statute and regulations * * * [and] 'courts have consistently refused to give effect to government-fostered expectations that, had they arisen in the private sector, might well have formed the basis for a contract or an estoppel.'"), cert. denied, 474 U.S. 842 (1985); William H. Glasson, *Federal Military Pensions in the United States* 1 (1918) ("Army pay and pensions are not matters of contract.").

That rule reflects the special nature of military service and the fact that, under the Constitution, the political branches have plenary authority to establish the terms and conditions for such service. See, *e.g.*, *Weiss* v. *United States*, 510 U.S. 163, 177 (1994); *Chappell* v. *Wallace*, 462 U.S. 296, 302 (1983); *Rostker* v. *Goldberg*, 453 U.S. 57, 64 (1981). In this case, the Federal Circuit reasonably viewed the "full free lifetime medical care" sought by petitioners as "a benefit received as deferred compensation upon retirement in lieu of additional cash." Pet. App. 20a. Petitioners likewise characterized the relief they sought as a "deferred component of [their] compensation." See Pet. Supp. C.A. Br. 17. Because such "compensation ha[s] long been exclusively a creature of statute, not contract," Pet. App. 26a, the Federal Circuit correctly declined to

hold that "discussions with recruiters" can form "binding contracts with the government," *ibid.*, absent a sufficiently specific foundation in positive law.

Petitioners do not allege that that holding conflicts with a decision of this Court or a decision of another court of appeals. Instead, they claim that it is important because—absent an authorizing statute, regulation, or other form of positive law to support it—"no pay, pension, deferred compensation, or similar claim brought by a member of the uniformed services" under an implied-in-fact contract theory "will any longer survive a motion to dismiss." Pet. 8. As an initial matter, the specificity of current military pay and benefits statutes, regulations, and programs makes it likely that that rule will be invoked only in a diminishing category of cases. In any event, the rule is a product of this Court's precedents and ensures that issues of military pay and compensation are handled uniformly, as provided by Congress through statute and by the military services through regulation.

2. Petitioners also challenge the Federal Circuit's alternative holding that, even if contract principles were applicable, no military official had "actual authority" to bind the government to promises of free, unconditional, lifetime medical care. See Pet. App. 30a-41a (no actual authority pursuant to 5 U.S.C. 301); *id.* at 47a-48a (no actual authority pursuant to inherent authority of Commander in Chief). According to petitioners (Pet. 9), 5 U.S.C. 301 provided the necessary authority. The court of appeals, however, correctly concluded that Section 301 "cannot authorize the creation of a benefit entitlement via contracts [because it] authorizes only 'housekeeping' matters like internal policies and procedures." Pet. App. 27a.

That conclusion is supported by Section 301's text and this Court's decision in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979). Section 301 provides that the "head of an Executive department or military department may prescribe regulations for the government of his department, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers, and property." 5 U.S.C. 301.[9] Contrary to petitioners' suggestion, that language nowhere suggests that military departments have authority to bind the government to promises of unconditional benefits, of indefinite duration, at an indeterminate cost. This Court's decision in *Chrysler Corp.* supports that conclusion. In that case, the Court construed 5 U.S.C. 301 to determine whether it authorized an agency to disclose corporate information that, according to Chrysler, was protected from disclosure by the Trade Secrets Act. Accepting Chrysler's argument that Section 301 does not authorize the promulgation of legislative-type rules—such as a rule permitting the disclosure of documents in derogation of the Trade Secrets Act—the Court held that Congress enacted Section 301 to provide for the "day-to-day

---

[9] Section 301 has antecedents from the beginning of the Republic, when Congress enacted legislation "'to help General Washington get his administration underway by spelling out the authority for executive officials to set up offices and file Government documents' [and] govern internal departmental affairs." *Chrysler Corp.*, 441 U.S. at 309 & n.39 (quoting H.R. Rep. No. 1461, 85th Cong., 2d Sess. 1 (1958)). In 1874, Congress consolidated those statutes into Section 161 of the Revised Statutes, which was later codified at 5 U.S.C. 22 (1925). Congress enacted the current version in 1958 with further amendments not relevant here. See *Chrysler Corp.*, 441 U.S. at 309 & n.39; *United States* v. *George*, 228 U.S. 14, 20 (1913).

office housekeeping in the Government departments." 441 U.S. at 310 n.41 (quoting H.R. Rep. No. 1461, 85th Cong., 2d Sess. 7 (1958)). The statute's plain language and legislative history, the Court continued, indicate that Congress intended Section 301 to authorize agencies to promulgate rules of "agency organization, procedure or practice," 441 U.S. at 310, not "legislative-type rule[s] * * * affecting individual rights and obligations," *id.* at 302.

Consistent with *Chrysler Corp.*, the Federal Circuit correctly concluded (Pet. App. 35a) that military officials could rely on Section 301 and its predecessors when prescribing rules that *permitted* retirees and their dependents to receive free medical care in *existing* military facilities on a *space-available basis*; such rules merely involve the military's management of existing resources and create no vested rights. *Id.* at 37a. However, Section 301 "plainly does not encompass the power to grant an entitlement" to free, unconditional, lifetime medical care, *id.* at 35a, because such an entitlement "obligates an agency to call in additional staff or to create additional space whenever a retiree seeks care, or to pay for civilian care. In other words, it goes beyond mere internal or housekeeping matters and creates substantive entitlements giving rise to judicially enforceable rights." *Id.* at 37a.[10]

---

[10] Petitioners contend that *Chrysler Corp.* is inapposite because the Court "did not address, let alone decide, anything concerning the substantive reach of 5 U.S.C. 301"; instead, petitioners construe *Chrysler Corp.* as interpreting only a single sentence of Section 301. Pet. 10. Those contentions cannot be reconciled with the Court's analysis of Section 301's text and history. 441 U.S. at 308-309, 311-312. Indeed, every court of appeals to consider the issue has—like the decision below—concluded that Section 301 does not authorize an agency to issue substantive rules that create

The contrary construction of Section 301, moreover, would place it "in considerable tension, if not conflict" with the Act of Sept. 6, 1950, Pub. L. No. 81-759, ch. 896, § 1211, 64 Stat. 765, the precursor to the Anti-Deficiency Act, 31 U.S.C. 1341. See Pet. App. 38a-39a. Under that early anti-deficiency statute, government officials could not "involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law." Act of Sept. 6, 1950, § 1211, 64 Stat. 765. The creation of an entitlement to unconditional, free, lifetime medical care by individual recruiters, moreover, would be inconsistent with 5 U.S.C. 70 (1946), which barred service members from receiving any "compensation, in any form whatsoever, * * * unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such * * * compensation."[11] The Federal Circuit thus properly concluded that, "although we need not and do not decide the independent applicability of 5 U.S.C. 70 or the Anti-Deficiency Act, we do decide that, in light of

---

entitlements. *United States* v. *McDonnell Douglas Corp.*, 132 F.3d 1252, 1255-1256 (8th Cir. 1998); *In re Bankers Trust Co.*, 61 F.3d 465, 470 (6th Cir. 1995), cert. dismissed, 517 U.S. 1205 (1996); *Exxon Shipping Co.* v. *United States Dep't of Interior*, 34 F.3d 774, 777-778 (9th Cir. 1994).

[11] The same provision now appears, as amended, as 5 U.S.C. 5536. It provides that an "employee or a member of a uniformed service whose pay or allowance is fixed by statute or regulation may not receive additional pay or allowance for the disbursement of public money or for any other service or duty, unless specifically authorized by law and the appropriation therefor specifically states that it is for the additional pay or allowance."

those two statutes, § 301 cannot be construed as broadly as the plaintiffs argue." Pet. App. 39a.

Petitioners err in asserting (Pet. 11-12) that *Georgia* v. *United States*, 411 U.S. 526 (1973), is to the contrary. In that case, the Court held that Section 301 authorized the Attorney General to promulgate *procedural* regulations to implement the substantive powers expressly granted by another statute (the Voting Rights Act of 1965). 411 U.S. at 536. The Court did not intimate that Section 301 authorizes an agency head to promulgate substantive rules of entitlement, or to impose an indefinite and continuing obligation on the federal fisc, much less to do so in derogation of statutes such as the Anti-Deficiency Act. For that reason, *Georgia* is entirely consistent with *Chrysler Corp.*, which held that Section 301 is a "housekeeping statute" relating to agency organization, procedure, or practice, 441 U.S. at 310, not an unlimited source of authority to create "substantive rules" controlling individual entitlement in derogation of other statutes, *id.* at 302, 309.

Petitioners' alternative contention (Pet. 12-13)—based on the allegedly inherent power of the President, as Commander in Chief, to authorize recruiters to make binding promises of free, unconditional, lifetime medical care for military retirees and their dependants—is similarly mistaken. Whatever the scope of the President's inherent powers, the United States, including the Executive Branch, has consistently taken the position that military recruiters were not authorized to create binding obligations to provide such care. Nor does this case involve a potential intrusion on the President's broad authority over the armed forces as Commander in Chief. To the contrary, the particular area at issue here—military pay and benefits—has long been governed by statute and regulation rather than individual

contractual promises made by individual recruiters to individual recruits. See pp. 14-16, *supra*. That unchallenged legal framework assists the President in his role as Commander in Chief by ensuring uniformity and predictability in matters of military compensation. See also Pet. App. 47a-48a.[12]

3. Although the petition challenges two of the court of appeals' alternative holdings, it does not challenge the court's third alternative holding. In particular, petitioners fail to challenge the court of appeals' holding that, even if petitioners' implied-in-fact contract claim were cognizable, and even if recruiters had authority to promise free and unconditional lifetime medical benefits, petitioners' written agreements foreclosed their implied-in-fact contract claims. Pet. App. 29a-30a. In those written agreements, petitioners agreed to be bound by military regulations. *Id.* at 30a. Military regulations, in turn, made it clear that health care for retirees was a conditional privilege, not an unqualified entitlement. *Id.* at 42a-46a. Addressing the Air Force regulation in effect when petitioners received their appointments, the court of appeals explained:

> Free medical care for retirees * * * cannot be an absolute entitlement under this regulation. Thus,

---

[12] Petitioners assert (Pet. 13) that the court of appeals impermissibly gave the Anti-Deficiency Act retroactive effect. Petitioners ignore that the Anti-Deficiency Act had a substantially identical antecedent in effect when petitioners received their appointments as Air Force officers. Pet. App. 38a n.13; pp. 19-20 & note 11, *supra*. Cf. *Hooe* v. *United States*, 218 U.S. 322, 334 (1910) (relying on antecedent of Anti-Deficiency Act for principle that "[i]f an officer * * * without the authority of Congress, assumes to bind the Government, by express or implied contract, to pay a sum in excess of that limited by Congress for the purposes of such a contract, the contract is a nullity").

> even viewing the pertinent regulation in isolation, the recruiters' promises of free lifetime medical care were inconsistent with the regulation. As such, the government is not bound by those promises.

Pet. App. 44a. See *id.* at 44a-46a (explaining that the regulations of other service branches made it clear that retired "personnel may receive free military medical care only if space is available").

Petitioners do not dispute the existence of the express contracts, their content, or legal effect. Petitioners likewise do not deny that, if a government agent makes a representation that is in conflict with governing regulations, the government is not bound by the representation. See *Federal Crop Ins. Corp.* v. *Merrill*, 332 U.S. 380, 384 (1947) ("[T]his is so even though * * * the agent himself may have been unaware of the limitations upon his authority."). Nor do they dispute the meaning and effect of the relevant (although now superseded) regulations. Instead, they ignore the court of appeals' conclusion that, "even if the Secretary of the Air Force himself had said to the recruiters that they could and should promise free lifetime medical care to aid recruitment, these promises, would be a nullity because * * * the pertinent [Air Force] regulations provided to the contrary." Pet. App. 43a-44a.[13]

Petitioners' failure to challenge an alternative holding renders further review inappropriate. This Court "reviews judgments, not statements in opinions," *Black*

---

[13] The court also held that "even if regulations from other service branches were relevant, which they are not, no regulations in place when plaintiffs joined the Air Force provided for an entitlement to free lifetime medical care; the regulations provide only for contingent care, principally based on availability." Pet. App. 44a-45a.

v. *Cutter Labs.*, 351 U.S. 292, 297 (1956), and does not ordinarily "decide questions that cannot affect the rights of litigants in the case before" it, *Lewis* v. *Continental Bank Corp.*, 494 U.S. 472, 477 (1990). Here, the court of appeals' judgment would stand on that unchallenged ground even if the Court were to grant review and resolve all of the questions presented in petitioners' favor. Further review is therefore unwarranted.

4. Petitioners' claim, like that of the claimants in *Sebastain*, ultimately rests on the notion that, "as a matter of policy and fairness," the government should dedicate more resources to caring for retired service members and their dependents, "furnish[ing] the free medical care" they were allegedly promised by recruiters. *Sebastain*, 185 F.3d at 1372. Congress, however, has been profoundly aware of the need to provide for military retirees and their dependents. See H.R. Rep. No. 532, 105th Cong., 2d Sess. 315 (1998) (the "availability of medical care for military retirees and their families [is] an issue of tremendous concern"). Indeed, it has repeatedly enacted legislation to enhance the services and care available to them. See pp. 4-9, *supra*; see also S. Rep. No. 29, 105th Cong., 1st Sess. 295 (1997) (new coverage options designed "to attempt to provide health care to military retirees who believed they were promised lifetime health care in exchange for a lifetime of military service").[14]

---

[14] While recognizing the desirability of providing such benefits, Congress has declined to recognize a contractual obligation to provide military retirees with free, unconditional medical care for life. To the contrary, the Senate Armed Services Committee has rejected that claim. S. Rep. No. 29, *supra*, at 295. That determination is entitled to deference. See *Weiss*, 510 U.S. at 177 (judicial deference is "at its apogee when reviewing congressional decision-

Most recently, Congress expanded medical coverage for retirees dramatically by creating the "TRICARE For Life" program as part of the Floyd D. Spence National Defense Authorization Act for Fiscal Year 2001, Pub. L. No. 106-398, § 712, 114 Stat. 1654A-176 to 1654A-179. See pp. 8-9, *supra*. That program offers retirees medical and prescription drug benefits beyond those provided by Medicare and by the military in its own facilities on a space-available basis. Those "new benefits for retirees and their eligible family members over age 65 result in a remarkably comprehensive health care benefit with minimal beneficiary out-of-pocket costs." 66 Fed. Reg. 40,602 (2001). Petitioners may not be fully satisfied with the options Congress has provided. Their complaints, however, are more properly directed to the legislative branch.[15]

---

making in [the military context]"); *Rostker*, 453 U.S. at 64 ("[C]ustomary deference accorded the judgments of Congress [in the military context] is certainly appropriate when, as here, Congress specifically considered" a constitutional question that is later raised in litigation.).

[15] As the en banc Federal Circuit stated (Pet. App. 69a-70a) (quoting *Abbott* v. *United States*, 200 Ct. Cl. 384, 390, cert. denied, 414 U.S. 1024 (1973)):

> We understand and appreciate the dissatisfaction of the plaintiffs with the change in the retirement pay system, as they have rendered long and faithful service to our country in time of peace and war. However, if they are to get any relief, it must come from Congress, as this is not within [a court's] jurisdiction.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ROBERT D. MCCALLUM, JR.
Assistant Attorney General

BARBARA C. BIDDLE
E. ROY HAWKENS
Attorneys

JOHN A. CASCIOTTI
Department of Defense
Office of the Deputy
General Counsel
Personnel and Health
Policy

MAY 2003